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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter

Amendment of Section 15.119
of the Commission's Rules
Relating to Closed Captioning
Decoders

RM - 8533

To: The Commission

COMMENTS IN RESPONSE TO PETITION FOR RULEMAKING

Home Box Office, a division of Time Warner Entertainment Company, L.P. ("HBO"), by its attorneys and pursuant to Section 1.405 of the Commission's rules, hereby comments upon the above-captioned Petition For Rulemaking (the "Petition") filed by the Consumer Electronics Group of the Electronic Industries Association ("EIA") on September 29, 1994.¹ In support of these Comments, the following is respectfully shown:

I. Introduction/Interest Of HBO

HBO is a leading supplier of premium video entertainment services, including the HBO and Cinemax cable programming services. These services currently are distributed by satellites

¹ The Petition was placed on Public Notice on October 13, 1994, Report No. 2034.

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to individual home owners and to commercial affiliates, most of which are cable television operators. Because HBO's services are subscription based, HBO maintains a high level of interest in the security systems employed by cable operators which ultimately protect HBO's services from unauthorized reception. HBO also seeks to encourage the consumer electronics industry to work to achieve compatibility of consumer products with cable television distribution systems so that consumers can utilize all of the features of their television sets and video cassette recorders when their equipment is connected to cable systems. HBO's interest in cable television security and consumer electronics compatibility motivates its submission of these comments on the Petition.

**II. The Commission Should Make an
Independent Assessment of the Extent
to Which Eidak Technology Is Used**

In the Petition, EIA requested that the Commission initiate a rulemaking to amend Section 15.119(1) of the Commission's rules. Specifically, EIA seeks to eliminate the requirement that closed captioning decoders of television receivers be compatible with Eidak copy protection technology deployed over cable television systems.²

According to EIA, Eidak copy protection technology is not being used by any cable system in the United States.³ Moreover, EIA concludes that Eidak technology will not be embraced by the

² Petition at 2-3.

³ *Id.* at 4.

cable industry.⁴ Under these circumstances, it is EIA's view that requiring consumer electronics manufacturers to maintain compatibility with cable systems that might use Eidak copy protection technology imposes needless costs upon the manufacturers and purchasers of television receivers.⁵

HBO has no independent knowledge of the extent to which Eidak technology is or may be used by cable operators. If EIA's assessment is correct, then HBO concurs that the continued requirement that consumer electronics equipment maintain Eidak compatibility is misplaced. Thus, if the Commission's independent analysis confirms EIA's, then HBO would support elimination of the Eidak compatibility requirement.

**III. Section 15.119(1) Of The Commission's Rules
Should Not Be Modified By Rulemaking**

Assuming EIA's assessment of the Eidak technology is correct, HBO does not believe that it is necessary to amend Section 15.119(1) in order to eliminate the effectiveness of that section to one technology that has failed to come to fruition. Section 15.119(1) of the Commission's rules provides in pertinent part that:

Certain cable television security techniques, such as signal encryption and copy protection, can alter the television signal so that some methods of finding line 21 will not work. In particular, counting of lines or timing from the start of the vertical blanking interval may cause problems. Caption decoding circuitry must function properly when receiving signals

⁴ *Id.*

⁵ *Id.*

from cable security systems that were designed and marketed prior to April 5, 1991.⁶

Nowhere in the text of Section 15.119(1) is the Eidak technology mentioned by name. Because the Eidak technology was in existence prior to April 5, 1991, however, that technology falls within the applicability of Section 15.119(1). Since Section 15.119(1) does not specifically identify Eidak in the language of the rule, it would be a fairly simple task for the Commission to waive the applicability of the rule with respect to Eidak or to issue a declaratory ruling to accomplish the same objective if the facts warrant that result. If, however, the Commission were to initiate a general rulemaking to modify Section 15.119(1), the proceeding could lead to a reopening of issues that the Commission already has addressed and could result in unnecessary changes to the rules of a much broader nature than would be required to address EIA's concerns.

**IV. The Commission Has The Authority To Modify
The Application Of Section 15.119(1) To
Eidak Technology Without Initiating A Rulemaking**

The Administrative Procedure Act ("APA") provides ample authority for the Commission to grant EIA's request without a rulemaking. Section 553⁷ of the APA, which is the general rulemaking section, provides in pertinent part that:

Except when notice or hearing is required by statute, this subsection does not apply --

⁶ 47 C.F.R. § 15.119(1).

⁷ 5 U.S.C. § 553.

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.⁸

Since it makes little sense to require manufacturers of television receivers to design and manufacture devices that are compatible with a technology that is not and will not be utilized, if the Commission's findings confirm the EIA position, the Commission could simply issue an interpretation under the APA of Section 15.119(1) to exclude the rule's applicability to Eidak technology. Such an interpretation would not have a sufficient impact to justify notice and comment procedure.⁹

In the alternative, HBO submits that, if EIA's view is correct, there are sufficient grounds for the Commission to waive the applicability of Section 15.119(1) as it applies to Eidak technology. Specifically, if the Eidak copy protection technology is not currently utilized, and will never be utilized, the requirement that manufacturers of television receivers design and manufacture decoders compatible with Eidak technology would not serve the underlying purpose of Section 15.119(1). On this basis,

⁸ 5 U.S.C. § 553(b).

⁹ See e.g., *Re Chicago Aluminum Castings Co.*, 535 F.Supp. 392 (N.D. Ill. 1981).

the Commission would have good cause to waive Section 15.119(l) as it applies to Eidak technology.¹⁰

IV. Conclusion

If the Commission finds the deployment of Eidak technology in the cable industry is unlikely, as EIA believes, the Commission should eliminate the requirement that television receivers be manufactured to be compatible with that technology. The Commission should accomplish this result, however, through the exercise of its authority to interpret rules under the APA, or to waive its rules, without initiating a rulemaking proceeding.

Respectfully submitted,

**HOME BOX OFFICE
A Division of Time Warner
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November 14, 1994

¹⁰ See 47 C.F.R. § 1.3. See also, *Press Television Corp.*, 6 FCC Rcd 6563 (1991) (Section 1.3 of the rules permits the Commission to issue waivers for good cause shown); *Thomas M. Staten*, 39 FCC 2d 16 (1972) (the Commission may waive any rule for good cause shown).

CERTIFICATE OF SERVICE

I, Jette Ward, a secretary with the law firm of Reed Smith Shaw & McClay, hereby certify that on this 14th day of November, 1994, a true and correct copy of the foregoing "**COMMENTS IN RESPONSE TO PETITION FOR RULEMAKING**" was sent via U.S. first-class mail, postage prepaid, to the following:

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